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HAROLD B. WILLE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 235

GEORGE V. TAWES,

Petitioner,

vs.

CIE. DES MESSAGERIES MARITIMES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT OF OF PETITION.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

The petitioner, George V. Tawes, respectfully petitions this Honorable Court for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

I. Statement of the Matter Involved

The issues presented to this Court are:

(1) Was the trial judge in error in finding that the proximate cause of plaintiff's injury was a negligent act or omission on the part of the defendant's agents.

(2) Was the trial judge in error in arriving at the conclusion that the proximate cause of plaintiff's injury was a negligent act or omission on the part of the defendant by means of the application of the rule of *res ipsa loquitur*.

This case is an action at law brought by George V. Tawes, a ship's pilot in the service of the Panama Canal. He was assigned to the steamship GRENOBLE to pilot the vessel in its transit through the Panama Canal. He boarded the vessel at Balboa by means of a step-ladder consisting of four steps which was furnished by the ship's crew. On reaching the Gatun locks, the vessel tied up and Tawes went ashore by means of the same ladder on which he had boarded to check the forward draft. The ladder remained at the same place at the same position during the transit from Balboa to Gatun. After Tawes had used the ladder in disembarking and was on the wharf, the boatswain adjusted the ladder by lifting it upward. When Tawes undertook to use that same ladder to reboard the ship, the ladder fell throwing Tawes to the ground and thereby injuring him. The District Court under those facts applied the rule *res ipsa loquitur* and found in favor of Tawes. The trial was by the District Judge and without a Jury.

The Defendant appealed to the United States Court of Appeals for the Fifth Circuit, which Court reversed the District Judge holding that it was error to invoke the rule *res ipsa loquitur* on this record.

A petition for rehearing was filed, pointing out to the Court of Appeals that the holding was contrary to the opinion of the Supreme Court in *Johnson* v. *United States*, 68 S. Ct. 391, 333 US 46. This petition for rehearing was denied on the 14th day of July, 1953.

II. This Court Has Jurisdiction

This Court has jurisdiction as there can be no further proceedings in the Court of Appeals for the Fifth Circuit

or in the District Court. This Court has explicit authority to review by certiorari such a judgment (28 USC 1254) and this Court has properly allowed the writ of certiorari in the same situation in *Johnson* v. *United States,* 68 S. Ct. 391, 333 US 46.

III. Questions Presented

There was a finding of negligence on the part of the respondent by the District Judge.

On the record of the case, the District Judge correctly applied the doctrine of *Res Ipsa Loquitur* in finding for petitioner.

The Circuit Court of Appeals for the Fifth Circuit's decision is contrary to the Supreme Court's decision in *Johnson* v. *United States,* 68 S. Ct. 391, 333 US 46 and is contrary to the Ninth Circuit Court's decision in *United States Lines* v. *Cummings,* 195 Fed. 2d 291.

IV. Reasons Relied upon for Allowance of Writ

(1) The decision of the Court of Appeals for the Fifth Circuit is contrary to the holding of this Honorable Court in *Johnson* v. *United States,* 68 S. Ct. 391, 333 US 46.

(2) The Circuit Court of Appeals for the Fifth Circuit has misapplied the cases of *Sweeney* v. *Erving,* 228 U. S. 233, and *San Juan Light Co.* v. *Requena,* 224 U. S. 89.

(3) The holding of the Fifth Circuit Court of Appeals for the Fifth Circuit in this case is contrary to the holding of the United States Circuit Court of Appeals for the Ninth Circuit in *United States Lines* v. *Cummings,* 195 Fed. 2d 291.

WHEREFORE your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the United States Court of Appeals for the Fifth Circuit com-

manding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court of Appeals had in the case numbered and entitled on its docket #13,921, *Cie. Des Messageries Maritimes* v. *George V. Tawes,* Appellee, to the end that this case may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment herein of said Court of Appeals be reversed by this Court and for such further relief as to this Court may seem proper.

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

I. Opinion of the Court Below

The opinion in the United States Court of Appeals for the Fifth Circuit (R. 256) has not yet been reported.

II. Jurisdiction

The date of the judgment of the United States Court of Appeals for the Fifth Circuit to be reviewed is June 18, 1953 (R. 260).

1. Rehearing was denied by that Court on the 14th day of July, 1953, (R. 264).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is 28 U. S. C. 1254.

3. The cases believed to sustain the jurisdiction of this Court are as follows:

Johnson v. *United States,* 68 S. Ct. 391, 333 US 46.
Jesionowski v. *Boston & M. R. Co.,* 67 S. Ct. 401, 329 US 452.
Lavender v. *Kurn,* 66 S. Ct. 740, 327 US 645.
Seas Shipping Co. v. *Sieracki,* 66 S. Ct. 872, 328 US 85.

III. Statement of the Case

On July 21, 1949, the petitioner, George V. Tawes, a Panama Canal pilot, upon the reglementary request of the agent of the steamship GRENOBLE for a pilot, was assigned by the Panama Canal to the transit of the said ship through the Panama Canal from Balboa, the Pacific terminal, to Cristobal, the Atlantic terminal.

Petitioner, with his Panama Canal crew of thirteen men, boarded the vessel at Balboa by means of a gangway leading from the dock to a stepladder connecting the starboard gunwale to the deck. Upon arriving at the locks at Gatun the GRENOBLE tied up starboard side to the lock wall, the top of the gunwale protruding about eighteen inches above the fender separating the ship from the wall. The stepladder was in the same position as during the boarding at Balboa.

While the ship was so secured at Gatun appellee disembarked by means of the stepladder onto the lock wall. During petitioner's absence after his disembarkation, which lasted for about from two to ten minutes, the boatswain of the GRENOBLE altered the position of the stepladder with regard to its position of contact with the gunwale. Appellee reembarked by stepping from the gunwale onto the stepladder. As soon as appellee affirmed both feet on the step-

ladder, the ladder slid away from the gunwale and out from under appellee, causing appellee to fall to the deck, sustaining the injuries that are the subject of his suit for damages.

The District Court Judge in his opinion held as follows:

"This record contains no facts establishing that the injuries received by Tawes were the result of or produced by any contributing negligence of Tawes, or of any voluntary assumption of risks outside the scope of his duties as Pilot of the Grenoble.

Counsel for Defendant contends that Plaintiff's right of recovery should be denied on the basis that 'there is no evidence of any negligence on the part of Defendant.'

The record in this case established that the ladder in question was the property of and was under the control of the Defendant. The ladder had been placed by Defendant for the use of plaintiff at Balboa. The ladder remained at the same place and in the same position during the transit of the Grenoble from Balboa to Gatun. When the Grenoble tied up at Gatun it was next to the lock wall and on the starboard side. The top of the gunwale was even or level with the Canal wall. Other members of the Canal crew disembarked from the Grenoble to the lock wall by stepping on top of the bitts. The ladder was a short distance from the bitts. Tawes instead of stepping on bitts used the ladder. After Tawes had used the ladder and was on the lock wall, the Boatswain of the Grenoble adjusted the ladder by lifting it upwards. That adjusting of the ladder by the Boatswain was not denied. The Boatswain was in position to see and evidently did see Tawes use the ladder in disembarking, and it is reasonable to assume that the Boatswain should have known that he (Tawes) would use it in reboarding the ship. When Tawes undertook to use that same ladder to reboard the ship, the

ladder from some unexplained cause fell, throwing Tawes to floor of deck. It is testified to by members of the Canal crew and crew of the Grenoble that the ladder with Tawes on it did fall, and that he received injuries as a result thereof.

Under those facts, and under the elementary principles of law, the rule of *Res Ipsa Loquitur* applies. Under that principle of law the burden of refuting any negligence causing the ladder to fall rested on Defendant. Defendant offered no proof to meet that burden, and in view of such failure the liability of Defendant has been sustained" (R. 25, 26).

Under the above set of facts and in spite of the above holding of the District Judge, the Court of Appeals reversed saying that it was error for the District Court to apply the doctrine *Res Ipsa Loquitur* on this record and that it was error for the District Court to hold that under that principle of law the burden of refuting any negligence causing the ladder to fall rested on respondent.

It is to reverse this holding of the Court of Appeals that these writs are applied for.

IV. Specification of Errors

1. The United States Court of Appeals for the Fifth Circuit erred in reversing the Judgment of the District Court for District of the Canal Zone.

2. The Court of Appeals further erred in holding that it was error for the District Court to apply the rule of *Res Ipsa Loquitur.*

3. The Court of Appeals also erred in holding that respondent met burden of explanation required under the doctrine of *Res Ipsa Loquitur.*

4. The Court of Appeals erred in that it misapplied the

cases of *San Juan Light Company* v. *Requena*, 224 U. S. 89, and *Sweeney* v. *Erving*, 228 U. S. 233.

5. The Court of Appeals erred in holding that the trial judge made no finding of negligence on the the part of the respondent proximately causing petitioner's injuries.

V. ARGUMENT

Summary of Argument

POINT A.—THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

POINT B.—THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IS IN CONFLICT WITH THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT IN UNITED STATES LINES VS. CUMMINGS 195 F. 2D 221.

POINT C.—TRIAL JUDGE DID FIND THAT THERE WAS NEGLIGENCE ON THE PART OF RESPONDENT PROXIMATELY CAUSING PETITIONER'S INJURIES.

Point A

The Decision of the Court of Appeals for the Fifth Circuit Is in Conflict With the Decisions of the Supreme Court of the United States.

The opinion rendered by Judge Borah in this matter relies upon the cases of *Sweeney* v. *Erving*, 228 U. S. 233, and *San Juan Light Co.* v. *Requena*, 224 U. S. 89, for the law on the doctrine of *Res Ipsa Loquitur*. Neither of these cases is a maritime case. Since the case at bar is a maritime one, in considering it, we must bear in mind the doctrine laid down in *Seas Shipping Co.* v. *Sieracki*, 66 Sup. Ct. 872, 328 U. S. 85, wherein this Court said:

> "These and other considerations arising from the hazards which maritime service places upon men who

perform it, rather than any consensual basis of responsibility, have been the paramount influences dictating the shipowner's liability for unseaworthiness as well as its absolute character. It is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. Mahnich v. Souther S. S. Co., supra; Atlantic Transport Co. of West Virginia v. Imbrovek, 234 U. S. 52, 34 S. Ct. 733, 58 L. Ed. 1208, 51 L. R. A., N. S. 1157; Carlisle Packing Co. v. Sandanger, supra. It is a form of absolute duty owing to all within the range of its humanitarian policy."

The Court of Appeals has obviously misapplied the *San Juan Light Company* and *Sweeney* cases, *supra,* as they have not taken into account this Court's decision in the case of *Johnson* v. *United States,* 68 S. Ct. 391, 333 U. S. 46. The *Johnson* case stands for the proposition that under the Jones Act the doctrine of *Res Ipsa Loquitur* is applicable to acts of a fellow servant. The Court of Appeals completely ignored this holding by this Honorable Court and by so doing has rendered a decision contrary to the decision of the *Johnson* case.

In the *Johnson* case, Johnson's shipmate, one Dudder was standing above Johnson. It was his duty to hold a block. He permitted the block to fall hitting Johnson on the head. Just as in the case at bar it was not certain why the ladder fell, so in the *Johnson* case this Court said "it is not certain why the block fell". 68 S. Ct. @ 393. The Court of Appeals in the *Johnson* case reversed feeling that Johnson might have pulled the block out of Dudder's hand. The Court of Appeals in the case at bar had no theory as to how the accident occurred. Mr. Justice Douglas on the above facts held as follows:

"But where, as here, the injured person is not implicated (Jesionowski v. Boston & Maine R. Co., supra),

> the falling of the block is alone sufficient basis for an inference that the man who held the block was negligent."

In the case at bar, the injured person, Tawes, was not implicated and therefore the falling of the ladder is alone sufficient basis for an inference that the man who adjusted the ladder was negligent. However, the Court of Appeals in its decision, instead of following the majority opinion of the *Johnson* case and finding there was sufficient basis for an inference of negligence, used almost the exact language of the dissenting opinion in the *Johnson* case, saying:

> "Since we cannot on this record determine how the injury to appellee occurred—it certainly was not established why the ladder fell—we are compelled to hold that the appellee failed to sustain his burden of proving by a fair preponderance of the evidence that his injuries were attributable to appellant's negligence."

This is almost word for word the language used by Justice Frankfurter in 68 S. Ct. at 395.

The majority opinion in the *Johnson* case however held as follows:

> "The inquiry, however, is not as to possible causes of the accident but whether a showing that petitioner was without fault and was injured by the dropping of the block is the basis of a fair inference that the man who dropped the block was negligent."

It is obvious therefore that the holding in the case at bar is contrary to the holding of the *Johnson* case as the inquiry in our case is not how the injury occurred but whether a showing that Tawes was without fault (R. p. 25) and was injured by the falling of the ladder is the basis of a fair inference that the man who adjusted the ladder was negligent.

The District Court found that it is and its judgment should not be disturbed unless it is clearly erroneous.

United States v. *U. S. Gypsum Co.*, 68 S. Ct. 525, 333 U. S. 364. We think that the record also shows that it clearly is, for the record shows that the ladder was used, not only by Tawes, but by others several times before it was moved by the boatswain. It was moved by the boatswain and the next man to step on it, Tawes, fell. The fact that it did not fall before the boatswain moved it but did on its first use afterwards seems to be conclusive evidence that the boatswain did not adjust it properly and at the very least would form the basis of a fair inference that the boatswain was negligent. As in the *Johnson* case the negligent employee, the boatswain, was not called as a witness.

The Court of Appeals found that the respondent had met the burden of explanation by "offering the ladder in evidence and by producing witnesses whose testimony tended to rebut any inference of negligence on its part". The ladder was produced in evidence but all that the witnesses testified to in regard to that ladder was that it was the same ladder on which Tawes fell. In other words, they identified the ladder. This evidence went no further than to show that there was no defect, latent or otherwise, in the ladder. It certainly does not explain or refute at all the fair inference of the negligence of the boatswain mate in adjusting the ladder. In other words, contrary to the holding in the *Johnson* case, the Court of Appeals did not apply doctrine of *Res Ipsa Loquitur* to the acts of the fellow servant, the boatswain, but narrowly held that since there was no defect in the ladder this was an unavoidable accident. In view of the fact that the boatswain adjusted the ladder right before Tawes fell, this holding is obviously incorrect. As we have pointed out above, the case was tried without a Jury and therefore the trial judge was the trier of the facts. As such, he is entitled to draw upon any logical inferences he saw fit in arriving at the conclusion that the defendant's negligence was the proximate cause of petitioner's injury.

If there is evidence to support his findings, the judgment is not reversible, since it is a firm principle of law that the judgment of a District Court should not be reversed unless it is clearly erroneous. *U. S.* v. *Gypsum Company*, 333 U. S. 364, 68 S. Ct. 525; *U. S.* v. *Yellow Cab Co.*, 338 U. S. 338, 70 S. Ct. 177. This doctrine is well stated by Mr. Justice Murphy in the case of *Lavender* v. *Kurn, et al.*, 327 U. S. 645, 66 Sup. Ct. 740, wherein he stated:

> "(4-6) It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

There was not, of course, a complete absence of probative facts to support the trial judges conclusion. He enumerated those facts in his opinion (R. 23 *et seq*). That evidentiary basis having become apparent, it is immaterial that the Court of Appeals might draw a contrary inference. Its function is exhausted at that point.

Therefore in spite of the repeated holdings of the Supreme Court of the United States laying down this principle, the Court of Appeals reversed the trial judge's decision here; a decision which was far from being clearly erroneous. This district judge's decision is in fact a correct decision as

it is a decision completely in line with the many holdings of this Court and particularly with *Johnson* v. *United States, surpa.*

POINT B

The Decision of the Court of Appeals for the Fifth Circuit Is in Conflict With the Decision of the Court of Appeals for the Ninth Circuit in United States Lines v. Cummings, 195 F. 2d 221.

The decision of the Court of Appeals is also contrary to the decision of the Court of Appeals for the Ninth Circuit in the case of *United States Lines* v. *Cummings,* 195 F. 2d 221. The facts in that case were the same as here. A pilot was attempting to board a ship. The first approach of the launch was unsuccessful. After this approach the ladder was raised for inspection and then lowered to the water. The next approach was successful, but when the pilot stepped on the ladder, it played out and dropped about two feet, injuring him. The defendant contended that the accident happened due to the launch crushing plaintiff's foot. The District Court found that it was not an unavoidable accident but was the result of the ship's negligence. This was affirmed on appeal.

The District Court in that case as here adopted the theory of the accident as contended for by the pilot and found that the danger was not obvious or apparent; that appellee assumed no risk; that appellee was not contributorily negligent; and that it was not an unavoidable accident and was the result of the ship's negligence. The Court said that the appellant with considerable logic argued that the injuries resulting from the accident could hardly have followed the happenings as described by the pilot. However, the Court said that they could not say its findings were clearly erroneous and so affirmed the District Court.

There was no more direct proof of negligence in the *Cummings* case than there was here. But in the *Cummings* case the Court found that it was not an unavoidable accident. Under the same set of facts in the case at bar the Court has obviously found that the falling of the ladder was an unavoidable accident. However, this same Fifth Circuit in *Johnson* v. *Macias,* 193 F. 2d 475, said that an "unavoidable accident is one which is not occasioned in any degree, directly or remotely, by lack of due care." The Court in that case also said:

> "There is no evidence here tending to show that plaintiff's injuries resulted from any cause other than negligence on the part of some one. The issue of unavoidable accident is therefore not presented."

There is absolutely no evidence here tending to show that Tawes' injuries resulted from any cause other than negligence on the part of the boatswain. How then can this be said to have been an unavoidable accident? The answer, of course, is that the accident was avoidable by the exercise of reasonable prudence by the boatswain in his adjustment of the ladder. If he had exercised due care in that adjustment the ladder would not have fallen. This is proven by the fact that it did not fall when used before the adjustment was made but did fall on its first use after the adjustment. The injury to petitioner therefore would have been avoided by use of due care and was not the result of an "unavoidable" accident. This is particularly so when viewed in light of the fact that this Court has held that the maritime service requires a higher degree of care than any other service. *Seas Shipping Co.* v. *Sieracki,* 66 S. Ct. 872, 328 U. S. 85. It therefore cannot be said that this accident was an unavoidable one; one not occasioned in any remote degree by lack of due care.

The Court of Appeals therefore has misapplied the doctrine of *Res Ipsa Loquitur* by reversing the district judge's finding that this accident was avoidable and that there was a fair inference of negligence on the part of the boatswain which was unexplained. In so doing that Court has rendered a decision directly in conflict with *Johnson* v. *United States, supra,* and *United States Lines* v. *Cummings,* 195 F. 2d 221.

POINT C

Trial Judge Did Find That There Was Negligence on the Part of Respondent Proximately Causing Petitioner's Injuries.

The Court of Appeals held that the trial judge made no finding of a negligent act or omission on the part of the defendant proximately causing petitioner's injury but that he found liability from the fact of the injury alone. The trial judge held as follows:

> "Under that principle of law the burden of refuting any negligence causing the ladder to fall rested on defendant. Defendant offered no proof to meet that burden, and in view of such failure, the liability of defendant has been sustained."

The trial judge therefore held that the defendant offered no proof to meet the burden of refuting any negligence causing the ladder to fall. Therefore there must have been made out a *prima facie* case of negligence by the plaintiff or there would have been no negligence to refute. The trial judge therefore having found *prima facie* negligence causing the falling of the ladder, the burden of going forward with the evidence shifted to the defendant; that burden being to destroy the preponderance of plaintiff's evidence, which had established a *prima facie* case, by evidence show-

ing lack of negligence on defendant's part or lessening the probative force of plaintiff's evidence.

Therefore it is submitted that the trial judge did find negligence on the part of the defendant or there would have been no necessity for his referring to the fact that the defendant offered no proof to meet the burden of refuting negligence upon his part.

Conclusion

The Circuit Court of Appeals has decided this case in direct conflict to *Johnson* v. *United States, supra,* in that it has not applied the doctrine of *Res Ipsa Loquitur* to the acts of a fellow servant. The *Johnson* case held that the doctrine was so applicable. The Circuit Court of Appeals ignored this holding.

In spite of the fact that the holding of the District Judge was not clearly erroneous but was in fact in conformity with the *Johnson* case, he was reversed and this is contrary to *United States* v. *U. S. Gypsum Co.,* 68 S. Ct. 525, 333 U. S. 364, and *United States* v. *Yellow Cab Co.,* 338 U. S. 338, 70 St. Ct, 177.

The facts in this case are the same as in *United States Lines* v. *Cummings,* 195 F. 2d 291. In the *Cummings* case the Ninth Circuit allowed the plaintiff to recover. In this case the Fifth Circuit held that the plaintiff was not entitled to recover. Thus Tawes has taken from him any recompense for his injuries due to the fact that his appeal lay to the Fifth instead of the Ninth Circuit.

Contrary to the findings of the Circuit Court of Appeals the District Judge did make a finding of negligence on the part of the defendant.

In conclusion, we should like to again point out that this pilot, Tawes, was in the service of the ship. The case of *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, 66 Sup. Ct. 872,

held that liability of the shipowner is not limited by conceptions of negligence. The shipowner is therefore an insurer. Therefore, in accordance with the absolute character of the shipowner's liability, "a species of liability without fault," (*Seas Shipping Co.* v. *Sieracki, supra*), the District Judge was correct in finding the shipowner liable for petitioner's injuries.

The decision of the Fifth Circuit Court of Appeals therefore should be reversed.

Respectfully submitted,

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SEP 12 1953
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Supreme Court of the United States

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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